BRIEF IN SUPPORT OF PETITION.

Opinions of Courts Below.

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 473.) was rendered on November 2, 1945. The opinion of the District Court for the Southern District of New York was rendered on September 13, 1943 (R. 467-468). Judgment was entered in the District Court on January 26, 1945 (R. 469-471), and by the said Circuit Court on November 2, 1945 (R. 478.).

Jurisdiction.

1. The date of the judgment to be reviewed is November 2, 1945; the petition for writ of certiorari is being presented prior to February 2, 1946, to wit, on or about December 10, 1945.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is the Act of February 13, 1925 (C. 229; 43 Stat. 938) amending the Judicial Code, Section 240 (a) Title 28 USCA Section 347(a) and Rule 38, subdivision (5) of the Rules of the Supreme Court.

3. The nature of the within case and the rulings of the Circuit Court are such as to bring the case within said jurisdictional provisions.

This case involves:

a. an important question of federal law which has not been and should be settled by the Supreme Court,

b. the decision of an important question of general law which is probably untenable, and, is in conflict with the weight of authority,

c. a decision by the Circuit Court of Appeals for the Second Circuit which is in conflict with a decision by the Circuit Court of Appeals for the Fifth Circuit.

4. Cases believed to sustain said jurisdiction are as follows:

Brooklyn Savings Bank v. *O'Neill,* 65 Sup. Ct. Rep. 895;
D. S. Schulte Inc. v. *Gangi* (writ granted November 19, 1945);
Anderson v. *Clemens Pottery Co.* (writ granted October 15, 1945);
Reynolds v. *U. S.,* 292 U. S. 443;
Southern Railroad Co. v. *Walton,* 284 U. S. 190;
Alaska Steamship Co. v. *U. S.,* 290 U. S. 256;
U. S. Navigation Co. v. *Cunard Steamship Co.,* 284 U. S. 474;
Southland Gasoline Co. v. *Bayley,* 319 U. S. 44.

5. The questions involved are substantial. Very many employers who give their employees statements as to the number of hours which their books show they work, and the amount of wages due the employees, are interested in knowing the legal effect of the retention of such statements and failure to claim shortages for unreasonable periods of time, and are directly affected by the decision in this case regarding the validity of the defense of account stated.

Businessmen generally are interested vitally in knowing whether settlements made with employees where an honest dispute is involved are permissible, and their attorneys are vitally interested in knowing how to advise them in such matters, and how to plead such a defense where it is available.

There are many lawsuits being brought pursuant to the Fair Labor Standards Act, where employees rely

upon memory evidence, rather than records, in order to make out a case, and it is important to judges and lawyers generally, and to employers, to know whether appellate courts should inquire into the quality of evidence, where cross-examination demolishes the main props of a *prima facie* case.

Statement of Case.

A statement of the case has already been made in the petition under the title "Summary Statement of Matter Involved" (pp. 1-7) which is hereby adopted and made a part of this brief.

Specification of Errors.

The Circuit Court erred in holding that:

(1) the defense of account stated is invalid and may not be pleaded in an action brought pursuant to the provisions of the Fair Labor Standards Act of 1938

(2) the defense of accord and satisfaction is invalid and may not be pleaded where it is alleged in the defense that at the time of the accord there was an honest dispute as to the facts stated in the complaint

(3) that a defense must state more than ultimate facts relied on

(4) that an appellate court will not inquire into whether a plaintiff's case contains satisfactory substantial evidence to support a recovery.

ARGUMENT.

Summary of Argument.

POINT I.

The decisions of the Circuit Court of Appeals and the District Court disclose plain errors of law.

POINT II.

The Circuit Court of Appeals has decided important and substantial questions of federal law which have not been but should be settled by the Supreme Court.

POINT III.

The decision of the Circuit Court of Appeals is in conflict with a decision of the Fifth Circuit which held to be reviewable the quality and sufficiency of evidence in cases brought under the Fair Labor Standards Act of 1938 where an employee testified to overall averages in computing his hours of work.

POINT I.

The decisions of the Circuit Court of Appeals and the District Court disclose plain errors of law.

It has been held that the principle of account stated is not confined to transactions between merchants, but that it has been extended to embrace transactions between other persons (*Rodkinson* v. *Haecker,* 248 N. Y. 480, *Stenton* v. *Jerome,* 54 N. Y. 480; that where an account is made up and rendered, he who receives it is bound to examine it or have someone else examine it for him; that he may either expressly admit its correctness or that such correctness may be implied if he keeps it for an unreasonable length of time and his silence construed as acquiescence in its justness (*Rodkinson* v. *Haecker,* 248 N. Y. 480).

In holding that the defense may not be pleaded at all in the instant case, the Circuit Court, as the District Court theretofore, has made a decision clearly against the weight of authority.

Rodkinson v. *Haecker,* 248 N. Y. 480;
Stenton v. *Jerome,* 54 N. Y. 480;
Griffith v. *Rosenberg,* 166 Wash. 677;
Standard Oil Co. v. *Von Etten,* 107 U. S. 325;
Dameron v. *Harris,* 281 Mo. 247;
Buchanan v. *Higginbotham,* 123 Va. 662;
Daniels v. *Wilber,* 60 Ill. 526;
First Nat'l Bk. v. *Peck,* 180 Ind. 649;
Kretni Dev. Co. v. *Consolidated Oil Corp.,* 74 F. (2d) 497 (C. C. A. 10) cert. den. 295 U. S. 759;

Again, in holding that the defense of accord and satisfaction is insufficient in law, where the defense pleads that at the time of the accord there was an honest dispute in good faith, the Court has made a decision probably untenable; although in the case of *Brooklyn Savings Bank* v. *O'Neill* (65 S. C. 895) this Court has held that a release may not be pleaded, where it clearly appeared from the record that the defense had the effect of cutting down what was concededly due an employee, that is not the case here; and the question whether such a defense is good, in a case brought under the Fair Labor Standards Act, has been expressly held open by this Court (*D. S. Schulte* v. *Gangi,* certiorari granted November 19, 1945).

The ruling of the Circuit Court, in the instant case, that the defense failed to plead sufficient facts is probably untenable, for it is provided in the Federal Rules of Civil Procedure that each averment in a pleading shall be simple, concise and direct (Rule 8[e][1], *Continental Collieries* v. *Shober,* 130 F. 2d 631, *National Millwork Corp.* v. *Preferred Mutual Fire Ins. Co.,* 28 F. Supp. 952, *Sierocinski* v. *Dupont,* 103 F. 2d 843), and the same rule

is applicable to special defenses (Rule 8[b], *National Millwork Corp.* v. *Preferred Mutual Fire Ins. Co.*, 28 F. Supp. 952) while only the ultimate facts need be stated, and not matters of evidence (*McInerney* v. *Virginia-Carolina Chemical Co.*, 118 Fed. 653, *Florence Oil & Refining Co.* v. *Farrar*, 109 Fed. 254, *Sovereign Bk. of Canada* v. *Stanley*, 176 Fed. 743).

POINT II.

The Circuit Court of Appeals has decided important and substantial questions of federal law which have not been but should be settled by the Supreme Court.

This case appears to be the first which presents for decision the question whether an employer may plead an account stated as to the number of hours worked during a workweek, and the amount of wages due for the week; it has heretofore been held that questions involving the interposition of affirmative defenses in suits brought pursuant to the Fair Labor Standards Act present substantial questions of federal law (*Brooklyn Savings Bank* v. *O'Neill*, 65 S. C. 895; *D. S. Schulte* v. *Gangi*, certiorari granted November 19, 1945; *Anderson* v. *Clemens Pottery Co.*, certiorari granted October 15, 1945, to name a few); it is respectfully submitted that this case is in the same category.

Also, with regard to the defense of accord and satisfaction, the Court is presented with the same question which is presented to it for consideration and resolution in the case of *D. S. Schulte* v. *Gangi*, with the single distinction that whereas in that case, what is involved is the consideration of the sufficiency of evidence, what is involved here is the consideration of the sufficiency of the pleading, rather than the evidence itself.

The questions presented by these two defenses are therefore new, important and substantial questions of federal law which have not been but should be settled by the Supreme Court.

POINT III.

The decision of the Circuit Court of Appeals is in conflict with a decision of the Fifth Circuit which held to be reviewable the quality and sufficiency of evidence in cases brought under the Fair Labor Standards Act of 1938 where an employee testified to overall averages in computing his hours of work.

The Circuit Court of Appeals for the Fifth Circuit has ruled that where evidence as to the material facts in a case brought under the Fair Labor Standards Act is uncertain and conjectural, so that the decision must be based on speculation and "averages made up from the uncertain recollections of" employees, there is "nothing substantial upon which to predicate a verdict" (*Jax Beer Co.* v. *Redfern*, 124 F. 2d 172). And this case has been followed elsewhere (*Lowrimore* v. *Union Bag & Paper Co.*, 30 Fed. Supp. 647; *Brown* v. *Carter Drilling Co.*, 38 Fed. Supp. 489, affirmed 116 F. 2d 27; *Manzely* v. *Hooven Letters*, 44 N. Y. Supp. 2d 398—N. Y. City Court).

Cross-examination of the three plaintiffs in the instant case pointed to an analogous situation—but the Circuit Court in the instant case refused to pay attention to the analogous facts presented, and refused to pass on the quality of the evidence, which pointed to irregularity, not regularity of hours, and was based on overall averages; this decision is in conflict with the *Jax Beer Co.* v. *Redfern* case, which holds the quality of the evidence is reviewable, to determine whether the recovery was indeed based on speculation and conjecture.

It is therefore respectfully submitted that, on the basis of the foregoing, this Court should exercise its review powers by granting a writ of certiorari, in order to consider and resolve the questions at issue and reverse the decision of the Circuit Court, if upon such review, the law and justice requires.

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